HANPLIB1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

In Re:

LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION 11 MD 2262 (NRB)

----------x

New York, N.Y.
October 23, 2017
10:46 a.m.

Before:

HON. NAOMI REICE BUCHWALD,

District Judge

APPEARANCES

SUSMAN GODFREY LLP
Attorneys for OTC Plaintiffs
BY: SETH ARD
GENG CHEN
BARRY BARNETT

HAUSFELD LLP
Attorneys for OTC Plaintiffs
BY: HILARY K. SCHERRER
SCOTT MARTIN

KIRBY MCINERNEY LLP
Attorneys for Exchange Based Plaintiffs
BY: KAREN LERNER

LOVELL STEWART HALEBIAN JACOBSON LLP
Attorneys for Exchange Based Plaintiffs
BY: GARY JACOBSON
JODY KRISILOFF

SULLIVAN & CROMWELL LLP
Attorneys for Defendant Barclays Bank PLC
BY: MATTHEW PORPORA
STEPHEN CLARKE

APPEARANCES (Continued)

BOIES SCHILLER FLEXNER
Attorneys for Defendant Barclays Bank PLC
BY: LEIGH NATHANSON

LOCKE LORD
Attorneys for Defendants HSBC
BY: ROGER COWIE
GREGORY CASAMENTO

COVINGTON & BURLING LLP
Attorneys for Defendants Citigroup Inc.
BY: ANDREW RUFFINO

SIMPSON THACHER & BARTLETT LLP (NY)
Attorneys for Defendants JP Morgan
BY: PAUL GLUCKOW

DAVIS POLK & WARDWELL LLP
Attorneys for Defendants Bank of America
BY: ADAM GABOR MEHES

WEINSTEIN KITCHENOFF & ASHER LLC
Attorneys for Bondholders
BY: DAVID H. WEINSTEIN
ROBERT S. KITCHENOFF

MORRIS AND MORRIS LLC COUNSELORS AT LAW
Attorneys for Bondholders
BY: KAREN L. MORRIS
PATRICK F. MORRIS

JOSEPH D. CARNEY & ASSOCIATES, LLC
Attorneys for Objector Managed Care Advisory Group, LLC
BY: JOSEPH D. CARNEY

BRENNAN, MANNA & DIAMOND, LLC
Attorneys for Objector Managed Care Advisory Group, LLC
BY: VICTORIA LYNN FERRISE
CHAD R. ROTHSCHILD

ARENT FOX, LLP
Attorneys for Objector Maimonides Medical Center
BY: LES JACOBOWITZ
JENNIFER WHITE

(In open court; case called)

THE COURT: Sit down, please.

MR. ARD: Good morning, your Honor. Seth Ard, Susman Godfrey on behalf of the plaintiffs.

MR. PORPORA: Matthew Porpora, on behalf of Sullivan and Cromwell for Barclays.

THE COURT: There's a few other people in the room. I guess most important is to note the presence of any objectors. So if there are some objectors in the room, would you stand, let me know who you are and who you represent?

MR. CARNEY: Joseph Carney, your Honor, from Joseph Carney and Associates, representing Managed Care Advisory Group, LLC.

THE COURT: Okay.

MS. FERRISE: Victoria Ferrise from Brennan, Manna and Diamond, also for Managed Care Advisory Group.

MR. ROTHSCHILD: Jack Rothschild, from Brennan, Manna and Diamond, also representing Managed Care Advisory Group.

MR. CARNEY: And we're here today, your Honor, with two of our client representatives.

THE COURT: Do you want to identify them, since I thought it was a little unusual that you submitted objections without, in the written material that I saw, identifying any client at all? So why don't we note the presence, who the clients are.

MR. SCHMIDT: Your Honor, Jim Schmidt, CEO of Managed Care Advisory Group.

THE COURT: Okay.

MR. KAMION: And Kurt Kamion, Vice President, Managed Care Advisory Group.

THE COURT: Okay. That is not what I meant about clients. The question in my mind was that you have never identified an entity that you represent, like Sullivan and Cromwell represents Barclays. The Barclays part of that has never been identified, in at least the papers that I saw, including ones that, for some reason, you filed last night at 6:00. Frankly, I don't understand a reason anytime a lawyer does that. Do you really not want the judge to know about it and read it?

MR. CARNEY: Your Honor, it took some time for that to be prepared.

THE COURT: Sir, how long has this been pending? Did you submit other material before?

MR. CARNEY: Yes, your Honor.

THE COURT: There's no excuse, none, zero.

MR. CARNEY: I apologize, your Honor.

THE COURT: Are there any other objectors? You can sit down.

MS. WHITE: Yes, your Honor, from Arent Fox LLP. This is Jennifer White and Les Jacobowitz for my Maimonides Medical

Center.

THE COURT: Okay. I guess we will hear from the plaintiffs first. Mr. Ard?

MR. ARD: Good morning again, your Honor. Seth Ard, Susman Godfrey on behalf of OTC plaintiffs. We're here today to request final approval of the settlement with Barclays plan of allocation and our fee and cost application. We settled with Barclays, as your Honor is aware, in November 2015 for $120 million and extensive cooperation for the benefit of the class. This is a tremendous result for the class under any measure, especially given the risks at the time of the settlement, when the antitrust claims had been dismissed on the merits in California and had not been decided.

This settlement was reached after two years of arms' length negotiations under the guidance of three investigators in the country, Layn Phillips, Daniel Weinstein and Ken Feinberg. None of the settlement funds revert to Barclays and the only claims against Barclays are the lease. The cooperation obligations include extensive proffers from Barclays' counsel, with his interviews he brought document production, declarations, trial testimony that has already tremendously benefited the class, and that cooperation is ongoing to this day.

Perhaps the most important endorsement of the settlement is that we sent direct notice to around 200,000

sophisticated investors, over a hundred thousand of whom have visited the settlement website already, and we disseminated a notification in publications that reached millions of people. And after all of that, we only have two objectors and only four opt outs, excluding those who have already filed complaints in this case. That is a ringing endorsement of the settlement, and it speaks volumes to the fairness, reasonableness and adequacy of the settlement under rule 23.

So, your Honor, there are three main issues on the table today, final approval of the settlement, the objections, and the fee and expense award. I can take each in turn, but I'm subject to however the Court would like to handle the hearing today.

THE COURT: You can go sequentially, as you did. I'm probably most interested in hearing from you on the objectors.

MR. ARD: Okay. Well, if your Honor would like --

THE COURT: You know, but I don't want to cut you off from saying anything that you wanted to say. You're certainly absolutely free to make any record that you like.

MR. ARD: Sure, your Honor. Frankly, we could rest on the papers but I can walk quickly through the Grinnell factors if your Honor thinks it would help.

THE COURT: Not personally to me.

MR. ARD: Okay.

THE COURT: I'm not always sure if I'm the audience.

MR. ARD: Sure. You know, we can rest on our papers. I guess I can say very quickly that the Second Circuit evaluates the settlement under, first, procedural fairness and then substantive fairness. Procedural fairness looks at the process by which the settlement was reached, and I've already touched on that and our papers address it extensively.

Great weight was placed on the recommendation of counsel, especially when there's mediators involved, like there were here. Here, the negotiations lasted over two years. It's also significant, I think, that the class representatives include sophisticated entities like Yale University and Baltimore, who carefully weighed the settlement, and the case law cited in our briefs recognize that that's a significant factor too.

On substantive fairness, what's called the Grinnell factors, there's nine of them. Again, our brief, I think, ostensibly walks through them, but I can just touch on each quickly. The first is the complexity, expense and likely duration of litigation. No one is more familiar with the complexity of this litigation than your Honor. You know the history of this case better than anybody and the challenges that it has faced.

The reaction of the class of the settlement I've already talked about. You know, Second Circuit recognizes that when there are a few objectors, that speaks strongly in favor

of the settlement. Here, we had an extensive notice program. We had only four opt outs and two objectors, excluding the entities that have already filed complaints in this case who opted out.

The stage of the proceedings. That sort of looks at the knowledge of counsel and, again, our papers detail the extensive knowledge that counsel has gained in this case, both up to the present and prior to the settlement, and that included, of course, extensive mediation briefing, where both sides were frank about their positions and the strengths and weaknesses of the evidence.

The risks of establishing liability damages. Again, I need not belabor the Court. Nobody knows the risk of establishing liability damages better than your Honor.

The risks of maintaining class action through trial is factor six. Again, this factor is measured at the time of settlement, and while we are confident that we presented a class certification brief that will meet your Honor's approval, things were far less certain in November of 2015 on that score.

And, of course, there's always the risk that the class won't be certified or that class could be decertified, as the cases recognize.

Ability of the defendants to stand greater judgments. Court recognizes when you're going against large corporations like Barclays, that factor has little weight, and courts also

recognize that when you get extensive cooperation obligations, that it offsets the fact that the defendant could pay a lot more.

Reasonableness of the settlement in light of the best possible recovery and the intendant risks of litigation. Those are factors eight and nine. Again, these factors sort of intertwine with each other. And the settlement $120 million and the extensive cooperation we're getting from Barclays, and the proffers and everything else are an excellent result to the class, especially in light of all the risks of the best possible recovery.

And because, of course, this was the first settlement in the case, with extensive cooperation, it has a potential to bring other defendants to the table, which it already has done with the Citibank.

Certification of the settlement class is the next issue. Again, we can rest on our papers both here and in the preliminary approval and the merits briefing. Your Honor last week asked the question about how it is that certain defendants can sort of concede class certification for settlement purposes and contest it on the merits, and sort of how those two overlap.

In Paragraph 7 of the proposed order, we stipulate that the certification of the settlement class is, quote, without prejudice to or the waiver of the rights of any

defendant to contest certification of any of the class and, quote, shall have no effect on the Court's ruling on any other motions certifying any class, and, quote, no party may settle or refer to the Court's approval of the class as persuasive or binding authority with respect to any motion to certifying such class.

I believe that should address the Court's concern. This is a frequent device that is used in class actions where you have multiple defendants and you have staggered settlements. The most recent example that I found was in Laben in a LIBOR case, they did the same thing, and there was a final approval last summer, where some of the defendants had settled; yet, they had the same sort of stipulation in there. The docket for that is 12 CV 3419 and the docket number is 720, it's Paragraph 22.

But this happens all the time with multiple defendants in a class action. Without it, you couldn't settle early defendants in these cases as often. And, of course, the Second Circuit has explained that the factors aren't the same anyway. The manageability you don't need to prove to settle class certification, and the Second Circuit in American International Group in 2012 explained that manageability is also an important factor relating to predominance, that actually figures in predominance. I think in that case, the Court said even if you can't prove fraud in the market, the securities fraud case,

which may damn your ability to prove the merits of a class certification, you still can get a settlement class certified because manageability concerns are not there; so it's a very difficult standard.

So as to the factors, again addressed in our brief, but again quickly numerosity is obvious. Anytime there's more than 40 class members, there's the presumption of numerosity.

Commonality, you only need one common issue. Here, there are many including whether LIBOR is suppressed or whether the banks colluded to suppress LIBOR, and so forth.

Typicality is met if the same allegedly unlawful conduct was directed at the class and the named plaintiffs, and that's clearly the case here. The allegedly unlawful conduct is a suppression, a collusion to suppress, and that affected all class members equally.

Adequacy in this court, your Honor already rejected the challenge to adequacy in the preliminary approval stage of the settlement, holding that, quote, in the interest of class representatives are aligned with other class members with unasserted claims. And that is largely the same objection that's being repeated now, where they address adequacy.

And predominance is routinely satisfied in antitrust cases, and that's true here. The degree of suppression, the existence of allocution are some of the main issues in the case, and superiority, again, given the size of class and only

a few opt outs, classified resolution is clearly superior. So that's a brief overview of sort of our class certification arguments in the briefing, which we rest upon.

Settlement class counsel, we request the Court approve Susman Godfrey and --

THE COURT: Why don't we leave that.

MR. ARD: Sure.

THE COURT: Okay.

MR. ARD: Sure. And, of course, I should have noted, too, that nothing I've talked about so far -- well, at least some of the class certification appointed Susman Godfrey. None of that has had any objectors, nobody --

THE COURT: I'm sorry? You mumbled.

MR. ARD: I'm sorry, your Honor. Nobody objected to some class certification, nobody objected to the appointment of Susman Godfrey, and I just wanted to point it out on the record.

THE COURT: Okay.

MR. ARD: It may help your Honor, too, to understand that the defendants reached out to us about certain concerns or comments they had in the proposed final order, and they didn't sort of address any of these issues in their comments, and we commented on what they did address.

Notice plan, happy to rest on the papers there. The Court has already approved the preliminary notice program, and

again, no objections to the notice program.

So plan of distribution, here we're getting into one of the objections, I think, as far as I understand it. First, it's probably important to lay out what the standards are for the plan of distribution. They began, the District Court has broad supervisory powers with respect to the allocation of settlement funds. A plan of distribution need only have a rational basis. Your Honor recognized that in the Imax securities litigation. Judge Cote recognized that in CDS last year, in re: credit default swaps.

A principal goal of the plan of distribution is the equitable and timely distribution of the settlement fund, and in the case of a large class action, the apportionment of the settlement can never be tailored to the rights of each plaintiff with mathematical precision. Again, all that's needed is a rational basis. Those are all sort of from CDS and from your Honor's decision in Imax.

The proposed plan of distribution is relatively simple. It pays out class members who had direct transactions with panel banks; so those that had transactions that qualify them to be part of the OTC class. It's a pro rata distribution based on their overall notional stake in the settlement, and the overall notional stake is calculated as the sum of the suppressed underpayments to that class member, and the magnitude of daily suppression was developed by Dr. Bernheim

using the expert modeling that he spent over a year developing, and that the charts reflecting that suppression are posted on the website.

Again, there's no payment or transaction of non-panel banks, and that's the subject, I believe, of an objection. Out of an abundance of caution, class counsel worked with allocation counsel to meet at arms length, and after careful deliberation, working with the settlement administrator, Ken Feinberg, they adopted a proposed plan of allocation; so let me jump in --

THE COURT: What do you mean allocation counsel, if you have a mathematical formula?

MR. ARD: We just wanted to make sure that other counsel looking at the same issue with Ken Feinberg, who was designated as the settlement administrator, would reach the same conclusion about sort of what was the right thing to do. So we are the ones who made the decision, to be clear, and we did it out of an abundance of caution. They spent a few weeks on it, and there's not that much lodestar that it generated.

But we did it out of an abundance of caution, sort of foreseeing any sort of objection that may arise in the context, but we don't think there's any issue there, to be frank. And plans with the pro rata distribution are frequently approved by the courts in this district. They are the preferred method of distributing settlement funds, and our briefing cites plaintiff

cases saying that pro rata distribution is the right way to go.

THE COURT: Your point is that no one has specifically objected to that formula?

MR. ARD: Correct, your Honor.

THE COURT: All right.

MR. ARD: Correct, your Honor.

So let me jump into the objections then, if there's no question on what I've said so far. And let me, since I just talked about planned distribution, let me jump into that part of MCAG's objection. So MCAG objects there's no payment under the planned distribution for transactions with non-paneled banks.

First, I think it's important to note that many of the major types of non-OTC transactions are not released. There's significant carve-outs here, and those carve-outs are for any other cases that are being actively litigated. So the carve-outs are for exchange-based claims, bondholder claims, Green Pond claims with 22 large financial institutions.

Except for Guarantee Bank, no one has brought suit on Green Space on transactions with non-paneled banks and Guarantee Bank itself has not prosecuted that action. It's been stayed for years. That speaks volumes about the proposed merits of those claims. Guarantee Bank also did not make any objection to the final approval of the planned distribution or the releases. It also speaks volumes. It did so at the

preliminary approval. Your Honor overruled their objections, and they don't make any objections to the final approval.

Second, class counsel, of course, considered the value of claims related to non-panel bank transactions, only those that were released, and determined that the released claims have no value. It's appropriate value-ment is zero in the proposed plan of distribution. That's for a number of reasons. It's important to think about what kind of claim we're talking about here. We're talking about a claim where Wells Fargo entered into a LIBOR-based swap with Morgan Stanley, and somehow Wells Fargo is going to sue Barclays for LIBOR out of that transaction. It's commonly referred to as umbrella theory of damages, and it has not been met with a lot of favor in court, but more importantly, your Honor has already rejected these times of claims in LIBOR Six, and the objectors don't feel with that fact in their objection.

THE COURT: No, the objectors don't seem to be aware of the Second Circuit's opinion in Gelboim. They don't seem to be aware of LIBOR Six, but you know, let me worry.

MR. ARD: Yes, the unfortunate thing is we made them aware of it in our reply brief last week, and they ignored it last night in their surreply submitted at 6:00, which we think should be struck anyway because it was filed untimely, and it's far too long, and this thing has been on the record for months. There's no reason they couldn't have sent the papers they did

last night months ago. But regardless, we made them aware of the issue and they didn't respond to it; so I don't know if there is a response.

THE COURT: They might have been aware of it in the first place, before they filed an objection, since those are published opinions, you know, for all to see.

MR. ARD: Correct, your Honor.

And the third point that I want to make, which I think is crucial here, is that courts often approve plans of distribution that value certain claims at zero dollars. Again, if they had looked at your jurisprudence on class action litigation, they would have seen that in re: Imax Securities Litigation, your Honor specifically held it permissible to value reclaims of zero dollars, provided there is, quote, a rational basis for doing so.

Given your Honor already dismissed these types of claims, there's clearly a rational basis for a valuing of zero. And I think it's worth quoting from Imax explicitly, where your Honor was dealing with planned distribution. Your Honor said, the assignment of no value to claims of investors who purchased after August 9th, not unreasonably reflects what we agree would be the considerable difficulty of establishing damages during this time period. The mere fact that lead plaintiff selects zero as a proper correction of the share price during this period of the settlement class does not alone undermine the

fairness of the plan of allocation because the selection of zero seems rational here."

Other courts frequently do the same. As recently as this year, Central District of California decision Van Win Gerden v. Cadiz, which is reported at 2017, U.S. District, Lexus 18,800 at pages 23 to 27, the court approved a plan of allocation, gave some claims arising from the early part of the class period zero weight in the payment formula, and the court also noted that those were claims released by the settlement. It's not uncommon. Courts do this all the time. Your Honor specifically held that you can do it if there is a rational basis for doing so. And, again, there's clearly a rational basis for doing so here, given LIBOR Six, given Gelboim and the strength of those claims.

So I think, I guess one other point I'd make on planned distribution, or two more points. One is, they cite Super Suds and In re: Auction Houses, but that misses the mark. In both those cases the court held that the released claims did not arise out of the same factual predicate. That's not this case. Your Honor has already explained that previously and, you know, I know that in their sprawling surreply last night, I didn't -- maybe I missed it, but I didn't see any of them talking any more about how the claims don't arise out of the same factual predicate. I think they've kind of given up that argument because clearly it does arise out of the same factual

predicate, as your Honor recognized, which is suppression of LIBOR inclusions, plus LIBOR. All of these claims arise out of that factual predicate.

And in Wal-Mart, the Second Circuit decision from 2005, I believe, the Court recognizing that the holdings Super Suds hinged on the fact that the class representatives did not engage in the transactions for which there are releasing claims, that's not our case. Here, we have a class rep, had OTC transactions and non-OTC transactions, as your Honor already recognized in the preliminary approval order.

So that's the plan of allocation part of the objection. I think it has no merit, and frankly, that seems to be the thrust, and perhaps the only part of their objection that's left, after their surreply last night. I can't tell, but let me quickly talk about the merits of their other two objections.

As far as I can discern what they are, the first, they object to the broad releases, and they object specifically to the release of non-OTC transactions. Now, of course, as your Honor is aware, and as Barclays can explain, if your Honor likes, defendants often insist on peace when they get a settlement. That's what they want, and the Second Circuit has held explicitly, and your Honor recognized in the preliminary approval order, that you can release claims, any claims that arise out of identical factual predicate. And as your Honor

recognized in the preliminary approval order, that is the case here because the claims against OTC banks and non-OTC banks all arise out of suppression of LIBOR and the collusion of suppressed LIBOR, same factual predicate.

You know, just to quote what your Honor said, your Honor held that claims relating to non-panel bank transactions, quote, do arise out of an identical factual predicate, which is the alleged suppression and manipulation of LIBOR. So this issue has been decided correctly. It's also worth noting, as we explained in our reply brief for preliminarily approval, which they, in fact, cited, even though they didn't cite your order on that, that we cite other cases where there's far less -- far more disparate claims are being released than those at issue here.

For example, Lomelli's v. Securities Investment, which is at 546 F.Appendix 3740, Second Circuit 2013, the court says it is permissible to release both direct and derivative claims against the defendants, even though those claims had disparate elements, and the decision your Honor quoted in the preliminary approval, is Adelphia and there the Second Circuit 2008, the court held that various fraud claims based on false statements made in different documents were based on the same core facts and, therefore, arose out of the same factual predicate could be released.

So we don't think there's much to that objection.

Your Honor has already rejected it, rightly so, and again, reading the brief last night, I'm not sure they're even pressing it anymore.

The last substantive objection they make is that the class representatives are inadequate. Again, your Honor rejected that in the preliminary approval order. You said the class representatives adequately represent the class members who have unasserted claims. Quoting Wal-Mart, you said adequate representatives -- adequate representation of a particular claim is determined by alignment of interest of class members. And then you noted that given that class post these claims had unnecessary claims, which means claims with non-OTC banks, quote, the interest of the class representatives are aligned with other class members on certain claims. So we don't think there's anything to that objection.

Let me now just say a couple of things about that sprawling reply brief that was filed last night, surrebuttal. I don't know what to call it. They propose subclassing the OTC class because of an alleged conflict. There is no conflict.

They propose redrawing the plan of distribution to assign value to claims related to the non-panel bank transactions even though those claims clearly have no merit.

They propose assigning -- MCAG proposed to assign itself to the committee in charge of redrawing the plan of distribution. This seems like a naked attempt to hold up final

approval of the settlement, and who knows what else the objective is, but it doesn't accomplish anything. And MCAG provides no basis for including itself in the process.

This court -- on subclassing, this Court has consistently rejected adversely subclassing OTC class such as was made twice by OCIU. There's no conflict requiring subclassing. The adequacy prong of rule 23 analyzes whether there is a conflict, and as just discussed, your Honor has already held that the named class representatives are adequate because the named representatives hold OTC and non-OTC transactions. So there's no conflict, and that's all that Wal-Mart requires.

MCAG makes this proposal that we need to quantify the value of released claims, and we need to somehow figure out the universe of all non-OTC transactions in the world. They want to have a committee in charge of that. They want to be in charge of this task force that's going to figure out how many non-OTC transactions around the world and what they were all valued at.

It's a waste of time. It flies in the face of the basic goal of planned distribution, which is timely distribution to class members, and it serves no purpose because it doesn't matter how many non-OTC transactions there are. All that matters is what each individual one is worth, and here, there is a rational basis for saying they're worth zero, and

that's all that matters. Nor do they say how they're going to go about trying to figure out how -- what all the OTC transactions in the world are.

So, I guess, standing, I think your Honor gets the point. I will say that we deposed them over the phone on Thursday to try to determine whether they had any standing because we read their papers, and we couldn't see any evidence of standing. So we took a short deposition, just to try to figure it out, and the deposition confirmed that they have no standing. I have a copy of it. We can hand it up, if your Honor likes.

THE COURT: Sure.

MR. ARD: The first page of what I handed up, your Honor, sort of calls out what we think are some of the -- I have another copy. The first page of what we handed up, your Honor, sort of calls out what we think are some of the most important sort of pieces of testimony that we got, but the gist of it is that MCAG is yet to provide the name of a single class member or identify the LIBOR-based instruments owned by any class member.

We asked for documents showing who these alleged clients are that they represent. They gave us like ten or 12 contracts with the names of the entities that they allegedly represent redacted, for some reason, even though there's a protective order. During the deposition, the deponent couldn't

name any of the people whose names were redacted from those ten to 12.

MCAG itself has no standing. It's never entered into a LIBOR-based transaction. The deposition revealed that MCAG did not seek or obtain permission from any of its clients to object before it did so. That's Page 31, 10 to 23 of the transcript. MCAG said it doesn't believe it even needs to notify its clients before objecting on their behalf. That's at deposition transcript Page 48, 16 to 22. MCAG did not show it's written objection to any clients prior to filing it. That's at the MCAG depo transcript Page 50, 21, 25.

And to be fair, your Honor, when I said they produced contracts, what I meant was they produced contracts between MCAG and MCAG's clients, and those had its client's names redacted. They've never produced anything suggesting that any of its clients had any transactions with the parent banks. There's no --

THE COURT: I followed that.

MR. ARD: In the depo we asked them to identify any particular client that they had that had a LIBOR-based transaction with a OTC and a non-OTC paneled bank, and they couldn't do so. So, I mean, we're just left with no standing whatsoever. They didn't tell their clients about their objections and so forth.

They cited some authority last night on standing

that's just completely irrelevant. First, they cite the Second Circuit decision Bhatia, B-h-a-t-i-a, and that allows a non-class member to object to the settlement only if its meets, quote, the required level of formal legal prejudice necessary for standing. As that decision explains, that level exists, and this is a quote, only in those rare circumstances when, for example, the settlement agreement formally strips a non-settlement party of a legal claim or cause of action.

That is not this case. They don't have any claims. They're not class members. MCAG has never transacted in LIBOR. It also cites to some case on representational standing, organizational standing. It's an Article III case. It has nothing to do with class action certification. Anyway, it doesn't have representational standing or organizational standing. It's never produced any evidence that any client was even affected, much less any client wanted to push this objection.

And I guess it's worth noting, finally, for MCAG that the requirements to object in the notice form that your Honor approved specifically required any objector to, quote, provide proof of membership in the class, including documentation evidencing the purchase of the U.S. dollar LIBOR-based instrument during the class period. If not, the objection is invalid. MCAG didn't follow that because it can't, and the objection should be struck. By contrast, Maimonides did follow

that, showing that it's not that hard to follow, if you can, but MCAG didn't.

Okay. I think that's all I have to say about MCAG, but I'm turning now, unless you have any questions. Oh, you don't have any. So let me just briefly touch on Maimonides. This one is a bit of a puzzler.

THE COURT: Okay. You can continue.

MR. ARD: One correction to what I just said, your Honor. They didn't cite Bhatia. Bhatia is the right response to what they said. So let me get the full cite for that because, again, they filed this last night and some of our star folk have already tracked down cases on this point.

THE COURT: I'm much nicer. I don't have my Cliff work Sunday night.

MR. ARD: So the cite is Bhatia v. P-i-e-d-r-a-h-i-t-a, that's 756 F.3d at 211, Page 218, in a Second Circuit 2014 published decision, and again, it says non-class member can object only if the settlement agreement formally strips them of a legal claim or cause of action.

Maimonides, again, it's a little puzzling what the objection is. They didn't file it with this court. They sent it to us in a letter, and the objection reads in full, let me just read it: The medical center's main objections include breach of contract, unjust enrichment by the breaching defendants, lack of transparency by the defendants,

insufficient class period time frame and inadequate compensation of class members due to the overall significant swapping exposure to class member. These objections are especially important to the minimum class members who are not-for-profit corporations and governmental entities that are still dealing with the aftermath of the recent financial crisis.

I don't know what that means, your Honor. The actual papers they filed complain about having to pay too high a termination fee in a transaction out of a Bank of America. That has nothing to do with Barclays, and nothing to do with this case. They also seem to be dissatisfied with a settlement amount they got in a different case called Municipal Derivatives. Again, it has nothing to do with this case or Barclays.

You know, objections to class period time frame, insofar as they're making that, are improper objections to the scope of the class. The decision on, I think we quote in re: Wachovia in our reply brief on that point, saying your objection regarding the scope of the class have no bearing on the fairness of the settlement of the class itself.

And, again, objection to the size and settlement are wrong and misplaced. First of all, it's an incredible result for the class, $120 million plus the cooperation, but second, as the Court has recognized in the cases we cited in our reply

brief on final approval on Pages 9 and 10, the proper recourse, if you don't think the settlement is big enough, is to opt out.

And the same is true for any client who's effected by MCAG. If it has a client, and we don't know if it does, but if it ever has a client that thinks non-OTC transaction claims are not getting enough money out of this, they can just opt out. Okay. So that's what I have, your Honor. Any questions?

THE COURT: No.

MR. ARD: And then I haven't addressed the fee application and cost application.

THE COURT: Why don't we just finish with the objections first, and then we'll talk about that.

MR. ARD: Sure. Thank you.

THE COURT: Let's see. We'll just do it in the order that counsel spoke. So, Mr. Carney, are you the spokesperson?

MR. CARNEY: Myself and Ms. Ferrise.

THE COURT: I think one of you is sufficient, either one.

MR. CARNEY: Thank you, your Honor. I think in large part, in summary, counsel for OTC plaintiffs just started their argument by indicating that your Honor had dismissed their claims. The Biltmore case had not come down, and yet, they negotiated $120 million settlement.

THE COURT: Barclays rolled over with the exchange-base plaintiffs, just as they did with the government.

They wanted to be the first in and first out. That's just historically what happened with Barclays. I mean, they settled with other people two years earlier, another subclass.

MR. CARNEY: I understand, your Honor. I appreciate that. My point was, with respect to the status of the case law that was being raised as why these claims have no value, they negotiated $120 million settlement at a certain status before the Appellate court decision had come down. My point is that these claims, these non-panel bank transaction claims, may still have value.

THE COURT: You know, no judge should ever predict exactly what is going to happen in the circuit, but if you've read the circuit's opinion in Gelboim, LIBOR Six was not a surprise, and I expect a certain consistency, and that consistency applies. Just as it did in the bondholder case, it applies to all the claims brought against non-panel banks.

So, as far as I'm concerned, because I take my rulings very seriously and very carefully, your claims have zero value. And, frankly, it was unfortunate for people in your position, the Gelboim planners went to the Supreme Court and got an Appellate decision on this issue, which didn't go their way. And perhaps the argument that you're making today would have been more forceful, had there not been an Appellate decision, which there are now two grounds to dismiss those claims, one of which was reversed and another one that came to life.

The argument could have been made, had you only had a District Court decision, that district judges get reversed sometimes and, therefore, claims have value even if they've been dismissed, but the history here is different. There was a decision by the Gelboim plaintiffs to go to the Supreme Court and make law on the appealability in the middle of an MDL, and that resulted in a Second Circuit decision which did not go their way and a subsequent decision by me consistent with the circuit.

So that is why, whatever may be the world in some other case where you can argue that a dismissed claim has value, in this case, that argument is particularly hollow.

MR. CARNEY: I understand exactly what your Honor is saying. I appreciate that.

THE COURT: Then there's very little else to say, sir.

MR. CARNEY: I did want to take a moment, if I could, your Honor, to address the standing question. It is true that we have not, as counsel and our client in the deposition was not yet able to specifically disclose the large number of clients we represent --

THE COURT: You know what, where is that -- this sort of reminds me of a joke of a friend from college, but it's sort of, how about name one? You have not named an entity. You are a business, as far as I can tell. You're a professional gadflies or whatever, but you don't have standing.

People who engaged in these transactions do. It is far from clear that they are not represented either in the settlement proposed or in the Green Pond case because that is, you know, out of this. So the notion that as of Thursday and as of your brief last night you have not identified an entity that is somehow otherwise unrepresented and actually transacted in LIBOR? Really, how can you possibly think you have standing?

MR. CARNEY: We did bring, your Honor, financial statements of approximately ten entities. So we would like to submit for in camera review. The only reason is these entities have not given us authority to disclose who they are.

THE COURT: That's too bad. You know, there's nothing embarrassing about transacting in a LIBOR instrument. Apparently lots of extremely wealthy and established institutions have. There's no privacy interest here that needs to be protected and, besides, that totally prevents any party, either the plaintiff class or the defendants, from challenging the bona fides of any claim.

We're not doing that. We've had lots of examples in this case where claims have been made and blown up. Okay? So it's not happening.

MR. CARNEY: It was simply because of our confidentiality agreements. All right, but we will certainly be filing here, your Honor --

THE COURT: You're done. Last night, you were done. You are past done.

MR. CARNEY: In our argument, your Honor, what we did point out was that -- and we have brought some other information, which I would offer, which is the report of the controller of currency with respect to the quantity of transactions by the top 25 financial institutions. All right? And that report shows that, I would say certainly the majority of these transactions, OTC transactions, in terms of the number of participants, are from non-panel participants. I think there are six or seven panel participants, and we could introduce that, your Honor, if we would be permitted to.

THE COURT: You can certainly state on the record the source of the argument that you're making.

MR. CARNEY: Your Honor, it's a report of the comptroller of currency, stating the no-show value of derivatives --

THE COURT: Who did the date and cite idea? I'm not interested in your editorializing.

MR. CARNEY: I believe, your Honor, it is a report that gets updated; so I don't have a specific report.

THE COURT: Then it's of no value.

MR. CARNEY: Well, it covers every year of the class period.

THE COURT: Look, there is a way to cite a document.

It could be an internet site, but it's got to be something that the rest of us can retrieve.

MR. CARNEY: Your Honor, I have brought ten copies. I'm more than happy to hand them out, and it has the internet site on it.

THE COURT: Okay. This is fascinating, but it really has nothing to do with the law that's been established in this case. This is a document you created?

MR. CARNEY: No, your Honor, just the cover. The last four pages are the comptroller of currency pages. The document, your Honor, contains annual reports by the comptroller of currency for specific dates, June 30th, 2007; March 31st, 2008; March 31st, 2009; March 31st, 2010. The number of institutions is approximately six panel banks on there, six or seven, and the remainder are non-panel banks.

The point was to illustrate that there are a large volume of transactions with the non-panel banks, and we heard today that the OTC plaintiffs have valued them at a dollar -- or zero, zero dollars. Before that, we could not tell, other than the planned distribution said nothing about the non-panel bank transactions. So in trying to understand how they reached that conclusion, we had --

THE COURT: We read decisions, that's how you realize that they're worth zero. They've been dismissed.

MR. CARNEY: I understand, your Honor.

THE COURT: All right?

MR. CARNEY: Now, with respect to the comment, we did not want to appoint ourselves to the panel, we suggested it. We did not suggest anything that we lead something. We felt that, look, the manner in which analysis was done was not apparent to us, and we will be filing, your Honor, billions of dollars of claims for our clients. So our clients are asking us about their transactions.

All right? We have an interest in being able to fully explain to them, you know, what is being made. So there will come a time, your Honor, after the claims are in, that all of the clients that we have, which will be probably a hundred or more, will have filed and it will be billions of dollars of values.

THE COURT: In claims involving non-panel banks?

MR. CARNEY: No, no, involving panel banks.

THE COURT: Then why can't your clients file their own claims?

MR. CARNEY: Your Honor, they like to hire firms. We've been endorsed by many organizations and institutions, financial and medical institutions. All of these financial institutions who use us, this is not something they do as part of a regular process, but it's something we do as a regular process. Just as the same way, your Honor, the class counsel brings this because it's not something that is brought on a

regular basis. It really does require a lot of expertise.

THE COURT: Well, if there are clients, who I suggest file in their own names even if you've done the work for them, they'll be, obviously, evaluated.

MR. CARNEY: Your Honor, we still felt that it was important to raise these issues. Our clients have raised them with us; so we wanted to bring them forth and, in that respect, we filed claims for them.

THE COURT: I think they would best be filed in client name and not in your name because you didn't do any transactions here.

MR. CARNEY: They are filed --

THE COURT: It has to be clear because the defendants all have the right to examine the bona fides of those claims, and if they're in your name, they can't.

MR. CARNEY: Your Honor, we filed --

THE COURT: I don't care who does the work.

MR. CARNEY: Right. I understand.

THE COURT: But forewarned is forearmed. It better be filed in the names of the actual transacting parties.

MR. CARNEY: And, your Honor, the Managed Care Advisory Group has been filing in over 55 class action settlements previously; so they're well recognized as being able to comply fully with all of the instructions.

THE COURT: Apparently you didn't in this case, but

that's okay. Let's go on, if there's more.

MR. PORPORA: Your Honor?

THE COURT: Yes.

MR. PORPORA: Sorry to interrupt. Matthew Porpora for Barclays. I think your Honor doesn't need this additional point, but I'll just make it nonetheless. If this document is intended to show that there's a serious quantum of transactions with financial institutions, related claims of which would be released by the settlement, that's not accurate. The great majority of the names listed here are actually entities that are carved out as a part of the Green Pond settlement. Again, I'm not sure if your Honor needs that additional detail, but a number of these show actually, and prove, that the biggest institutions are, in fact, carved out in the settlement between OTC and Barclays.

MR. CARNEY: We understand the carve-outs, your Honor. Our point was that we are looking at this $120 million that is on the table today, and not with respect to the future and other litigations. That was our point in coming forward in this case. Give me one minute, your Honor.

(Pause)

Your Honor, my client has just -- yes, they filed in the names of the clients.

THE COURT: Good.

MR. CARNEY: And our coming forth started out on an

informational basis, your Honor. It did lead to the objection. We appreciate everyone's attention.

THE COURT: You know, just remember something. There are other rulings that have been made by me already and will, I think, continue to be made in the context of the pending class cert. motions. Just remember that in the settlement there's no netting. So this is a cake-and-eat-it approach. You know, you need to realize that there are real pluses to settling and not going all the way.

MR. CARNEY: We understand, your Honor.

THE COURT: And, actually, so does Maimonides Medical Center have to realize that.

MR. CARNEY: And we observed that certainly we do not want to opt out. We like the results. We want our clients to participate in this other aspect of it.

THE COURT: Clients whose claims have not been dismissed can participate, but either the carved-out ones -- and you just have to realize the consistency of the legal position. It extends past the bondholders. Okay. All right. Thank you.

MR. CARNEY: Thank you, your Honor.

THE COURT: All right. I'll hear from Arent Fox. Sir?

MR. JACOBOWITZ: Hi.

THE COURT: Just state your name for the record.

MR. JACOBOWITZ: Sure. Les Jacobowitz of Arent Fox, a partner in the finance and real estate group and dabble lately in some litigation.

So, one, I appreciate the tremendous effort of everyone in this room, the plaintiff's counsel, the defendants' counsel, the plaintiffs themselves, the defendants, the mediators, the Court in trying to get this settled, and to point out what the judge has said, Maimonides doesn't disagree. We agree that this should be settled.

This is a very complex case, a long, drawn-out case. We're just tying to understand what the settlement means, as far as determining whether it's a fair and reasonable settlement, which I think is the standard for determining whether the settlement is proper. So, first, one of the first things that I laid out in the letter to the Court was that there was a lack of transparency regarding settlement recovery.

THE COURT: What are you talking about? I don't think we understood and the plaintiff earlier said that he didn't understand that.

MR. JACOBOWITZ: I'll get to that. The question is, I am not -- we are not clear about what the percentage of recovery is versus the overall damage. Typically, there's a dollar amount and a percentage, and it's not clear is this being settled on ten cents on the dollar, eight cents?

THE COURT: No one knows. All right? Doesn't it

depend on who makes claims?

MR. JACOBOWITZ: Well, I assume you can estimate, just based upon past history, that 40 percent of the people of the class get put in claims. So it's hard for Maimonides, or any other institution, to determine whether it's a fair and just settlement.

THE COURT: What you're saying is not whether it's fair and just, it's just you don't know how much you're going to get.

MR. JACOBOWITZ: No, I don't think that's true. Maybe you think it's true, but I think when I've done settlements, we typically know and negotiate whether it's going to be ten cents on the dollar, 50 cents on the dollar or 80 cents on the dollar, and in this instance, it is not clear to the class members what the percentage is.

THE COURT: Well, I'll let counsel answer you because they probably have a better idea, but the other point is that this is one of two settlements involving Barclays and the over-the-counter class. There are a ton of issues left. It is conceivable that this is the end, in other words, and this is different. This is not there are other defendants, there are issues up on appeal.

You know, your bottom-line question, how many cents on the dollar, is unanswerable in a big picture because of the state of the rest of the case, because of the limited

settlements. Right?

MR. JACOBOWITZ: No, I get that.

THE COURT: This is very different from a case where the settlement is the equivalent of the end. This is not an end. This is like a footnote, at least certainly from my perspective it's a footnote.

MR. JACOBOWITZ: So I'm not clear, as part of the settlement, what is covered. So it covers bonds, swaps, loans and swaps related to, I believe -- I'm not sure, or does it not?

THE COURT: I think you're right.

MR. JACOBOWITZ: Okay.

THE COURT: Do you want to --

MR. JACOBOWITZ: Please, please.

THE COURT: Let counsel answer you.

MR. ARD: Sure.

THE COURT: Maybe he knows what you're getting at better than I do.

MR. ARD: I don't, your Honor. It's defined in the settlement agreement and the proposed order, but it's transactions on which the plaintiffs received LIBOR-based payments and that were directly purchased from panel banks. I don't know what else.

MR. JACOBOWITZ: So one question is, many hospitals and colleges borrow money through banks and get equipment

leases. So that is an active thing, especially with hospitals. They're buying CAT scans and other equipment. Is that covered as part of the counsel, because these capitalized leases are based on LIBOR often.

THE COURT: No. Frankly, the more you talk, the more you are probably going to persuade me that the individual issues outweigh the common issues when I start deciding the class cert. motions.

MR. JACOBOWITZ: All right. Well, you know --

THE COURT: I mean, I just make that point.

MR. JACOBOWITZ: So another question on the definition, and then I'll get into more broader questions. So swaps purchased before the class period and held during the class period, and this is a question for everybody, is that part of the settlement or not?

THE COURT: Have you read my decisions?

MR. JACOBOWITZ: No.

THE COURT: Okay. Well, there's an answer in there.

MR. JACOBOWITZ: Okay.

THE COURT: I don't have them all at my fingertips.

MR. JACOBOWITZ: All right. Well, I do believe it is a disproportionate settlement. With the Department of Justice, CFTC and USFSA, they had an aggregate settlement of $435 million. Here, the settlement with Barclays is $120 million. Now, part of the settlement with respect to the regulators was

you're all LIBOR related, and part of it was LIBOR related.

So if you did the same percentage of the markets of LIBOR related versus your LIBOR related, you would get a settlement, using what the regulators use, of $191 million for an equivalent type of settlement.

THE COURT: Sir?

MR. JACOBOWITZ: Yes.

THE COURT: You need to know more about this case. You need to understand that the banks have alleged a 16-bank conspiracy and to date have not proven it. Okay?

MR. JACOBOWITZ: No, I --

THE COURT: And do you realize that it is entirely possible that the whole thing can explode at the end? All right? So whatever the government is able to extract, they've extracted, but there are enormous issues.

MR. JACOBOWITZ: I can't agree with you more.

THE COURT: Down the pike, they're merit based. They're based on issues related to class certification. There are, I believe, ten Daubert motions addressed to the experts proffered in this case. This is very much, shall we call it, a work in progress, and that is the world that you have to make your decision in.

MR. JACOBOWITZ: Yes, I'm not of the litigation world. I'm of the finance world, and believe me, I know swaps are complicated and this whole process is.

THE COURT: That's not --

MR. JACOBOWITZ: I'm agreeing with the judge's point. There are also questions about other losses, and I read the distribution plan. I'm not clear, and it's not that I'm questioning, I'm just not clear. There were often termination fees required over the years for a swap. So Maimonides was approached by the bank to pay $4 million several years ago to terminate the swap. They did not. They restructured it, but if they had terminated it, and many of the plaintiffs had terminated, does that mean that as part of the distribution that they get paid interest from that period of time distributions -- termination to settlement, payment settlement? That's a question. I don't know the answer.

THE COURT: Would counsel like to respond to him?

MR. ARD: Sure, your Honor. I mean, he said if they had paid it. I think the papers said this happened in 2012 after the class period ended. You know, what we do in all of these cases with other plaintiffs, and I'm a little perplexed why Maimonides didn't do it here, is if anybody has a question as whether an instrument falls in the class, they give us a call and we tell them the answer. And that happens with some frequency in all class action settlements.

I can't speak in the abstract about some hypothetical that didn't even happen and whether that would be released or not. I would say, for example, in CDS, just last year, Judge

Cote sort of dealt with a similar objection, which by the way, they didn't had put in their papers. If they had, we would have addressed it today.

But Judge Cote felt and objection to the scope of the leases and the objector was saying, well, it's not clear if this is released or that is released. And what Judge Cote said last year was, you know what, that's something that you can deal with in the future as the issue arises, and we can litigate down the road whether the release applies to this particular claim or that particular claim and so forth.

So I would say that's the simplest answer to this, is that it's premature now, and if they had put this in a brief or called us and talked to us about it, we could give them more specifics, but it's hard for me to answer in the abstract.

MR. JACOBOWITZ: Well, that's more concrete and not with respect to Maimonides. I don't represent the City of Chicago. They had to pay $400 million and had to borrow money to pay that termination fee of $400 million. And the question is do borrowing costs, as well as when they had to do that, is that being part of the settlement? And that's a question, and I guess the answer is no, and that's fine. I'm just trying to get clarity on the settlement distribution process.

The parties had to post collateral. They had to post hundreds of millions of dollars. Maimonides and other entities had to post collateral. Is that collateral posting being

considered part of the distribution and the settlement? And again, I'm not clear it is, but maybe that's not how things are supposed to work here in this distribution.

Swap, the banks are supposed to be fiduciaries. They have no obligation to the counterparties, meaning the not-for-profits, the government entities, et cetera. A CFO once told me, who else am I going to rely on other than the banks on structuring deals and on the swaps? Well, there's new SEC rules telling them who people are supposed to rely on. The rulings were in 2014 that underwriters in the banks do not have a fiduciary duty to provide advice. They have to get a municipal advisor on a transaction.

Now, that doesn't apply here, of course, but the same logic would apply, that in doing the settlement, there would be someone who is familiar with swaps who would be a muni advisor. And I'm not sure, I don't know, and this is out of ignorance, I don't know if the people determining the distribution or the settlement have consulted with municipal advisors who are now required by the SEC to be registered, and anyone who today would enter into a swap has to get a municipal advisor because the bank cannot provide fiduciary advice. They're excluded from the swaps. They said we don't provide any fiduciary obligations to the bank.

And so the question is: Is there a muni advisor? And I don't know the answer. And a muni advisor is for bond deals,

swaps and any other sort of transactions relating to municipal financial products.

The plaintiff's counsel went through the Grinnell test, and again, most of it relates to continuing litigation and Maimonides, and I think everyone in this room would agree this case should be settled, but my only point really is with respect to clarifying what the settlement process and distribution is, could get a little clearer and would be helpful to the class.

And as I said, there's no real estimation of whether the 120 may be more than fair. It may be less than fair. I just can't tell. So the plaintiffs' counsel said sophisticated investors and players are involved in the transaction. Well, in my practice, which is not litigation, obviously, it's finance, I've represented banks and I've actually worked with banks in unwinding swaps. And often when I'm working with the swap desk, they really even don't know how the swap termination payments and the swaps are supposed to be online.

The plaintiffs, they're sophisticated, right? They're great at providing services, healthcare, education, government services, but frankly, that's why they hire people like me. They're not necessarily experts in finance or, in particular, on swaps, which, as you pointed out, your Honor, are very complex instruments. So if you don't mind me indulging, I, years ago, represented this institution on its first swap. The

institution was Yale University. They really had no idea how the financing worked or the swap worked.

I presented to the board, in a two-and-a-half hour meeting, the diligence and the structure of the transaction. It was a hot summer, not air conditioned room, windows were open, next door was the music building. Every few minutes there would be someone singing or playing the piano. A certain number of the board members, including some well-established board members and people who you would know the names, were asleep, and they really didn't quite fully understand the transactions that they were having, and it actually made them part of the settlement.

So as far as fairness goes, okay, if the 120 is right, that's perfect, fantastic. If it's not, this will increase costs for healthcare, education, provision of government services if they don't get the amount that they were due if this were a fair settlement. You can --

THE COURT: If there was some amount of money that years ago they should have gotten and they didn't get, then they would get some money, that's a positive. There's nothing here going forward.

MR. JACOBOWITZ: Oh, it's people. Let's talk about that. They've gone into debt to pay -- Jefferson County had to pay a billion dollars or more to unwind swaps. They had to raise taxes, water and sewer taxes down in Jefferson County in

Alabama. This has real impact. It happened years ago, but it's impacting those communities today. I could be wrong, but --

(Continued on next page)

THE COURT: We're not solving the entire world's problems.

MR. JACOBOWITZ: OK.

THE COURT: I'd love to have the authority to do that, but somehow I don't.

MR. JACOBOWITZ: I spoke to the general counsel for Maimonides a week and a half ago because the plaintiff's counsel asked me to withdraw the objections. So I talked to her, and she said, well, you know, this was bad behavior; right? And I said --

THE COURT: Not proven yet.

MR. JACOBOWITZ: I was just going to say "allegedly." And there were other alleged not proven behavior. There was bid rigging on swaps. That was the case I was alluding to. I don't know if you're familiar with that case. There was mortgage fraud, some of which I worked on getting moneys for to help communities and homeowners who were disadvantaged by the housing crisis. This is different. This is the most wide-sweeping alleged fraud on the market in history. The LIBOR market, the derivatives market, is -- you're not going to believe me when I tell this to everyone in the room -- is 150 trillion, with a "T," dollars. The U.S. economy is 18 trillion and change. In the Barclays case, the chairman of the board was forced to resign. The next day the CEO resigned. And my point, and I don't know how these settlement

negotiations -- it would be ironic if the 120 million was the number that had come from Barclays in determining whether -- the settlement amount that is being decided today.

So, in conclusion, I've done 60 to $70 billion of financing over my career. I've done billions of dollars of swaps. I'm usually in a different environment than today, usually at a conference table, but I think I myself am not clear on whether the settlement is fair or not. It may be the most fair settlement possible; it may not. I just can't determine whether it is. In any event, Maimonides Medical Center and all the other Maimonides Medical Centers out there who were impacted by this appreciate their day in court so you, the Court, can arrive at a fair and just settlement. Thank you.

THE COURT: Does any lawyer want to respond?

MR. ARD: I can respond briefly. Just a few points. I mean, I hate to hearken back on it, but he's complaining about the lack of transparency in the settlement agreement when his objection is the least transparent objection I've ever read. Everything he said today was brand new. I didn't understand a lot of it, but if he'd raised that to us either informally -- let me take the podium -- either in a call, which is what all class members do, they reach out to claims administrators, reach out to us, we can answer any questions they have. We don't ask questions in the abstract. If you

want to show us a particular document, figure out if it's in the class or not, happy to do it. It's pretty easy.

The size of the settlement, as your Honor noted, it depends on the claims rate. There's no way of estimating the claims rate, and that's true in just about every settlement, especially true here.

What's in the class? It's defined in paragraph 2QQ of the settlement agreement, what a U.S. dollar LIBOR-based instrument is, the class definition is there. Maybe he didn't read it, but it's there. And, again, if he has any questions about it, he can let us know.

He asked a bunch of hypotheticals about whether this claim was paid by the settlement agreement. I mean, the answer, I think, is clear. What the final distribution says is that if you have LIBOR-based payments that are coming in, then you get your payments based on the suppressed amount of LIBOR as measured by Dr. Bernheim's model. It's simple and pro rata, and I don't understand the complication.

As to what claims are released, again, the release is very straightforward. It's what the Second Circuit has repeatedly endorsed and it's what your Honor's already endorsed on preliminary approval. It's in FF of the settlement agreement. It's also in proposed final order. You know, it says, in avoidance of doubt, released claims do not to include claims relating to or arising out of the purchase of non-U.S.

dollar LIBOR-based instruments, so that's an exclusion, or any other claims that do not arise out of the factual predicate of the OTC action.

So he gave all these hypotheticals about terminations and all that and whether they're covered or not. I mean, in the end, it's a simple question: Is he alleging that the termination was the result of the suppression of LIBOR? If so, if that's the complaint that he were to make in the future, then Barclays -- and they file their complaint against Barclays even though their transaction was with Bank of America, then Barclays could move to dismiss their complaint as being barred by the release. If he's not alleging that it arose out of the factual predicate of the OTC action, then it's not released. It's that simple. That's what Judge Cote explained last year in the CDS case is that you have to look at any claim that's asserted in the future to figure out whether it's released or not. This is the exact kind of language the Second Circuit has repeatedly endorsed.

I think that's all that he said that I sort of understood in terms of its bearing on the settlement. As far as the overall recovery of the class, I mean, it's in the expert report of Dr. Bernheim which your Honor has which is under seal. The Second Circuit has said that even recovery that's a thousandth of a percent can be fair and reasonable depending on the context of the case. The expert did not do

analysis of Barclays because Barclays had settled long before the expert reports were in. But, regardless, the settlement is meaningful, it's large, especially with the risks of this case. And joint and several liability, of course, you can recover claims against remaining in the rest of the case, anything that's outstanding. On page 9 and 10 of our reply brief, we cite several cases that say that objection to the size of the settlement is not normally heard on final approval, and the remedy is to opt out if the objection is to size. The most important point which your Honor made is we can't estimate the recovery of any particular class member in advance because it just depends on the amount of claims made. So Mr. Porpora may have a few things to say.

MR. PORPORA: Matthew Porpora for Barclays.

Your Honor, I want to join in the comments made by Mr. Ard. I also, quite frankly, didn't understand most of the arguments being articulated by Mr. Jacobowitz. But to the extent that the hypotheticals he was articulating were meant to describe situations where someone, for example, paid too much money to terminate a swap and that was a direct cause of LIBOR manipulation, manipulation of U.S. dollar LIBOR, to the extent that he believes the plan of allocation doesn't adequately cover his damages, he has every opportunity to opt out.

He talked about Jefferson County and needing to spend loads of money. I didn't follow the hypothetical totally, but

to the extent that he believes that if he represents someone that suffered some damage as a direct result of manipulation to the U.S. dollar LIBOR, he can look at the plan of allocation as Mr. Ard just described it, and he can make a determination about whether he believes it is in his interest to participate in the settlement. He has every opportunity to opt out if he believes that it's unfair to his particular client under a particular circumstance.

But, again, I agree with Mr. Ard that these are all types of questions that he would have been able to put to the OTC plaintiffs and flesh out in advance of today. Barclays routinely got questions from potential class members, and what we did was we said: Barclays doesn't take any position with respect to the plan of distribution, as was set forth in the settlement agreement itself. Please call up counsel for the OTC plaintiffs. And folks did that quite regularly, so they were able to explore these hypotheticals or actual circumstances in relevant time and not burden the Court with them here today.

THE COURT: Sir. We're going to let the inner litigator in you come out again.

MR. JACOBOWITZ: Not really. So on timing, that is a valid point. The general counsel of Maimonides found out about it, this settlement, I'm sorry, October 5. How did they find out? They got a class claims notice from a -- it wasn't

actually from these guys. It was another entity. That's how they found out about it and that's why they called me. It's no excuse. It's just factually, and that's why I didn't -- one of the sets of counsel here did call me, and we did talk about some things. They were confused and puzzled with some of the objections. So, to their credit, they reached out to me.

So opting out, that seems to be the answer that the counsel think is good for everybody, but I think -- and, again, I'm not the litigator -- if we opt out, isn't the statute of limitations for most of these claims gone? I'm asking.

THE COURT: You can answer.

MR. ARD: It was the same day that the objections were due. So the point is if you want to opt out, he could have opted out then.

THE COURT: No, no, he's asking about the statute of limitations. Could he now bring his own case? And I think the answer is if there's a pending class action in which he is a class member, it stays the statute of limitations so that if he opts out now, he can bring his own case.

MR. ARD: Right. And he can read LIBOR IV, I think it is --

THE COURT: I forget which one.

MR. ARD: -- which has a hundred-page discussion of cross-jurisdictional tolling.

THE COURT: Let's put it this way: It's an option,

but I just point out to you that to the extent that Maimonides ever profited from LIBOR, that's going to count against you in any individual case that you bring. One of the clear, broadly speaking, benefits of making your claim in the context of the settlement is that that netting doesn't apply.

MR. JACOBOWITZ: I appreciate it, and I appreciate the Court understanding what all the netting aspect means in a swap, so I do appreciate it. And thank you.

THE COURT: Well, that will just help you make your decision, and you'll let us know, I guess.

MR. JACOBOWITZ: Right. I do want to answer or try to answer the substantive stuff that I'm familiar with, and that is swaps, when the financial crisis happened, interest rates dramatically can decreased. And what that meant was that there was a termination value ascribed to swaps. That termination value was reflected in the not-for-profits and government's financial statements on a yearly basis and on a quarterly basis, and it was called mark to market. The swap was marked to market to whatever the value of the swap attributable at that time based upon interest rates. So if interest rates dropped conversely, the mark to market increased dramatically. So they had on their balance sheets significant liabilities attributable to these swaps.

If at that point -- and it's not conjecture. I have other examples -- if at that point they wanted to terminate the

swap, why would they terminate the swap? They wanted to refinance. They had to put up collateral, and they didn't have it. They needed to refinance because interest rates were going down. So there were a whole host of reasons that that swap would be terminated. At that point, whatever the mark-to-market value as determined by the banks, because they're the ones who provided the government and not-for-profits the mark-to-market value, whatever that value was, is the termination fee that had to be paid to Barclays and other banks. That termination fee was considerable often because rates had dropped dramatically because of the onset of the financial crisis. So my example with Chicago was recently they were downgraded as part of the financial crisis. They also had a tremendous collateral requirement for these swaps. So they had to come up with cash or treasuries or other securities to collateralize it. They didn't have it, so they refinanced the debts. They had to borrow new money to pay the termination fees for that swap. So I don't know if that clarifies things.

MR. ARD: It's the same --

THE COURT: He's a fairly good teacher, but, you know.

MR. ARD: It's the same point I made earlier. If he brings a claim where he says that his client was harmed because of the factual predicate of the OTC action, because of suppression, or something else, the claim is released. If he

has a claim that's based on something else, not because --

THE COURT: The drop in interest rates is not totally the consequence of any alleged action here. You had a recession. So think whatever you do of the defendants here in the context of this case. We can't ascribe to them this totally -- ability to control the world based on, frankly, any of the evidence that has come out so far in the case.

MR. JACOBOWITZ: Your Honor, you're right. I should elaborate a little more on the termination fee. So $4 million -- I'm giving them a modest example -- that was the termination fee because of interest rates dropping. Say, a half a million was subscribed to the suppression of LIBOR. That is the amount I'm talk talking about.

THE COURT: I don't believe there's any -- I haven't read all the expert reports yet. I've gone through a number of them. I don't think there are any expert reports that deal with that type of analysis, to my knowledge. There's a bunch of lawyers here who may want to challenge my understanding, but having read the briefs, I don't think there's that kind of analysis. Part of the problem is that that, I think, raises very individual issues that have a lot to do with the financial strength of Maimonides verses the financial strength of General Motors, or whatever, who may have had similar transactions, and one could negotiate in and out of them in different ways. So I think that's probably not something that's likely to be very

subject to class action treatment, but I don't think anyone's attempted to put that kind of issue into this case really.

MR. JACOBOWITZ: I believe that if it's used in numbers, 20 basis points suppression, alleged suppression, of the banks, that would be the same to all class members, whether it's General Motors or --

THE COURT: I understand that, but that's not what I understand you're raising. We're probably off topic at this point.

MR. JACOBOWITZ: Yes, I understand.

THE COURT: Thank you.

All right. Does anybody else have anything to say on the issue of objections, the settlement itself before we turn to the attorney's fee issue?

MR. ARD: No, your Honor.

THE COURT: On attorney's fees, I have some things to say. Perhaps it's best that I just say them.

MR. ARD: Sure.

THE COURT: I think that the request for all your fees and expenses to date seems totally inappropriate for a number of reasons. First, the overwhelming percentage of the fees and expenses that have been incurred have absolutely nothing to do with your settlement with Barclays. It is literally impossible, since you settled with Barclays on August 24, 2015, over two years ago, that everything you've spent since then has

to do with Barclays. There also must be a relationship between fees and success. In seeking all your time and expenses, you're assuming total success. But at most, including the Citibank settlement, you've had success against two of 16 defendants, and if I am affirmed, even worse. You've had a loss of at least eight or so. I don't remember the exact number.

So based on what I've just said, it's clear that I'm not approving the attorney's fee request. You need to go back to the drawing board from when you resubmit. I will want detail and backup. I want it clarified as to what work relates to the Barclays settlement, and I want some detail and not statements like "we've spent $13 million on experts." That's not acceptable to me at all. So whatever may be appropriate and/or considered acceptable in the context of a settlement that closes the case and you're ultimately just seeking a percentage of recovery is not appropriate here at all. So you need, really, to go back to the drawing board on that.

I don't expect you to respond, but I actually did have one more question that actually goes back a bit to our earlier discussion. In the context of both the settlements by the bondholders and the settlements by the exchange-based plaintiffs, the parties have pooled the settlement into a single presentation to the Court, and so I do have a question for you. Why haven't you, and also, what is your distribution

plan? Do you plan to wait to see if the Citibank settlement is approved? I think it's in January, perhaps. Or do you plan on doing this twice? Or just enlighten me.

MR. ARD: Sure. I'll take the last question first. The reason we didn't do them together is because of timing. We had already done the preliminary approval and notice plan, and I think it was already out the door before we reached the Citibank settlement, so we couldn't. That's why we didn't do it together.

The plan of distribution, when it's going to be distributed, I think the claim forms are due in December. So we certainly could do one distribution. I am not sure how much efficiency that creates, but we're happy to do it. The reason I say it may not --

THE COURT: Look, I've never personally distributed $120 million or anything, so I'm not speaking from experience here as to what is efficient or not. It just seems to me that doing -- that you're doing a mathematical calculation. You could do it for both settlements at one time and send one check, or maybe you don't even send checks these days. I'm probably dating myself. Frankly, my concern is not whether you do it one way or the other in the abstract, and I'm not asking you to do -- how could I put it?

MR. ARD: Commit to anything.

THE COURT: Commit to anything. And I don't want you

to do something just because I asked you a question about it, but I do want you to not spend the settlement funds in a profligate way.

MR. ARD: Of course, your Honor.

THE COURT: That's the point. So the point is class members get the most possible amount, and if it makes sense to do a single distribution, that makes sense. Maybe there's some adjustment that in some respect you -- something you should consider. That's my only point.

MR. ARD: Sure, your Honor, and we will discuss it with the claims administrator. The reason I say it may not be more efficient to do it once is because it's the same class members and it's the same calculation. So once you do the calculation for Barclays, it's not like you have to do redo those calculations for Citibank. You just have to apply those same calculations for Citibank. There may be additional claims that come in, but the work you've done for Barclays will not be duplicated. I'll talk with the plan administrator. The only reason we may do it earlier is because we don't want to presume in December that your Honor is going to approve the Citibank settlement in January, and we'd like to get the money in class members hands as quickly as possible. It's our intention to do so.

THE COURT: Just think about it.

MR. ARD: We'll let you know.

On your preliminary comments, of course, your Honor, we will submit more detail and backup. I guess we can file a settlement brief addressing these issues. I anticipated these questions because I heard you ask similar questions last week to the bondholder plaintiffs, and I certainly can address them now if you'd like, and then we can try to address them further in our briefing. I guess what I would say, briefly, is as it is mentioned, it's the same class of people, the Barclays class, the Citibank class, and the plan of distribution is calling for everybody to get money equally no matter whether you transacted with Barclays or you transacted with Citibank or anybody else. So all the costs that have been expended in these case up until now have benefited the class equally, and that's why we think it makes sense --

THE COURT: But let's assume that two months from now a decision comes down from the Supreme Court -- so this is totally hypothetical -- and it blows this case out of the water.

MR. ARD: Yeah.

THE COURT: And at that point you have settled with two of the original defendants and the other 14 are totally down the tubes. Tell me why the class members should pay as if you had had success against 16. And the point is that if they pay now and in the future the case goes south, the class members have paid all your fees. You come out fabulously, and

they come out paying for stuff they shouldn't have paid for, and you're not recovering any of it from them. That's the point. There has to be a relationship, because you don't have the right to every penny because you couldn't possibly have justified some of these expenditures in a case that was a fraction of the size of the case that you actually brought.

MR. ARD: Sure, your Honor. I understand the point. I guess we can address it. It comes up too in the Citibank context. There, I think the settlement was reached, I want to say, right around the time of the reply brief and class certification, and that class certification briefing, expert reports, and depositions certainly alleged strongly to that settlement. So I don't think that issue is really present at that point in time.

With the fees, all I would say -- again, we can put supplemental briefing on this, and we will -- if you look at sort of the -- there are scores of cases where if you look just at the $120 million settlement amount, we are asking for 30 percent net of costs, which would be, I think, 26.5 percent of the gross amount is what our request is. And just looking at Barclays alone, that type of request is commonly granted in this district. The first case I point to --

THE COURT: When the case is over totally, but that's not this case.

MR. ARD: Sure.

THE COURT: This settlement was reached over two years ago. So while there are certainly efforts that you've made in presenting the settlement and crafting the documents in connection with the settlement that are specifically relevant, there's an awful lot of stuff that has nothing to do with Barclays. You may be right that there's more that has to do with Citibank, and you can decide whether you maybe want to wait to seek your fees at that point. But I still think that there's a fundamental problem with lawyers who have had success in an eighth of the case that they brought getting their entire fees.

MR. ARD: Sure.

THE COURT: And that's going to remain even at the Citibank point.

MR. ARD: I understand. All I want to say is that we are seeking fees from Barclays alone because we're seeking fees under the percentage method, and that has nothing to do with any future settlements we may get with the other 16 defendants or 15 defendants. It's only from Barclays, so we are asking your Honor to look just at the Barclays result.

THE COURT: I understand that, and I'm not totally prepared to do that --

MR. ARD: Sure.

THE COURT: -- for the reason that I explained to you that if your case blows up, you have come out golden, but the

class members aren't doing so well if all your fees are already been paid.

MR. ARD: Sure, your Honor. The percentage is coming out of Barclays alone, so we're asking you to only look at the Barclays settlement. The question, I think, arises more in the context of a lodestar multiplier cross-check and what lodestar we're looking at when we are doing the cross-check, and we certainly are happy to look at if your Honor --

THE COURT: Look, you couldn't have spent $13 million on expert fees to settle the Barclays case. Can't. So you're asking for stuff that is so unrelated to Barclays by itself that it does not seem -- I use the word "inappropriate" to not use a more pejorative word.

MR. ARD: Sure. Your Honor, we will submit supplemental briefing on this, and one thing that we can point out in the supplemental briefing is that it is routine in class action settlements where you have multiple defendants that you get --

THE COURT: But that's different. It's different than in your typical securities case. So you might sue the company, you might sue some individuals, you might sue the accountants, you might sue the lawyers, but here, you alleged a conspiracy. You alleged the same action against everybody, so it does matter what your success is. It's not the same as your case against the accountants in the securities case. That is more

divisible intellectually. This case is not set up that way.

MR. ARD: Sure. I understand, your Honor.

THE COURT: OK.

MR. ARD: My only point -- I was thinking more of the expenses issue, and we'll brief it. But in countless cases where you have multiple defendants in antitrust cases where you're alleging conspiracy, you get an early settlement against some defendants, and you have a bunch of defendants left in the case, it's routine for courts (1) to approve all expenses up to date in the case, even if the case could blow up, and (2) it's also somewhat routine for courts to award a large portion of early settlements to be earmarked for future expenses in the case. That's done in -- *Air Cargo* last year did it. Judge Marrero in *In Re Municipal Derivatives*, another antitrust case, made the entire expenses payable from the first settlement. And the reason, again, is because it's the same class. And, yes, of course the case could blow up, but that money was incurred by counsel and the money was used for the benefit of the entire class, and so it makes sense that it come out of the first class settlement.

But, your Honor, I understand your point. We'll submit briefing on that. We'll also break down the expenses more. And at the time of the Citibank settlement, perhaps your Honor will agree that -- we'll be able to persuade your Honor that all expenses should come out at that point.

THE COURT: All right. Are we done for the day? Anybody have anything they want to say?

All right. We'll take everything under advisement. Thank you very much.

MR. ARD: Thank you, your Honor.

(Adjourned)